

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARNOLD SIEGELAUB	:	DETERMINATION
	:	DTA NO. 807997
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and the New York City Administrative Code for	:	
the Year 1983.	:	

Petitioner, Arnold Siegelau, 83-24 258th Street, Floral Park, New York 11004, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1983.

On December 14, 1990, the Division of Taxation by its representative, William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), and petitioner, by Steven R. Goldberg, Esq., agreed to have the controversy determined on submission without hearing. Petitioner filed his brief on June 5, 1991. The Division of Taxation filed its response on July 5, 1991. Petitioner filed his reply brief on August 5, 1991. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation timely assessed petitioner for income taxes determined to be due for the year 1983.

FINDINGS OF FACT

Following an audit of petitioner's New York State and City of New York Resident Income Tax Return for the year 1983, the Division of Taxation issued a Notice of Deficiency to petitioner, Arnold Siegelau, which set forth additional tax due of \$6,694.46 and interest of \$2,109.86, for a total amount due of \$8,804.32 for the tax year 1983. Said Notice of Deficiency

was dated April 14, 1987.

On April 22, 1991, both parties, by their representatives, stipulated to the following facts:

(a) On April 17, 1987, petitioner received, via regular mail, an envelope containing a Statement of Proposed Audit Changes with respect to the assessment which is the subject of this proceeding. The envelope bore a machine-metered postmark dated April 11, 1987.

(b) On April 16, 1987, the United States Postal Service attempted to deliver to petitioner, via certified mail, an envelope containing the Notice of Deficiency which is the subject of this proceeding. The envelope bore a machine-metered postmark dated April 14, 1987. On April 17, 1987, petitioner received the envelope containing the Notice of Deficiency from the United States Postal Service.

(c) The parties agree that the sole issue to be determined is whether the Notice of Deficiency was issued prior to the expiration of the period of limitations on assessment set forth in Tax Law § 683. Aside from the statute of limitations issue, the merits of the assessment are not in issue.

As part of its submission, the Division of Taxation submitted the affidavit of one Stanley K. Devoe, principal clerk in the Manual Assessment Unit, who, as part of his regular duties, supervised the issuance of notices of deficiency. Attached to said affidavit was an alleged "certified mail record" which contained certified control numbers and the names of each taxpayer receiving a Notice of Deficiency thereunder. Mr. Devoe further testified in his affidavit that the alleged "certified mail record" indicated that a Notice of Deficiency was sent to Mr. Siegelaub at his address in Floral Park, New York by certified mail on April 14, 1987.

The alleged "certified mail record" did not bear any notation or official stamp of the United States Postal Service or the initials or signature of a United States Postal Service employee. Also, said form, three pages in length, contained a typewritten date of April 6, 1987 and two handwritten notations of "4/14/87".

Petitioner filed his New York State and City of New York Resident Income Tax Return

for the year 1983 in a timely manner.

It is noted that April 15, 1984 was a Sunday.

SUMMARY OF PETITIONER'S POSITION

Petitioner contends that the Division has failed to meet its burden of proof with regard to the issue of whether the Notice of Deficiency was mailed on or before the last day prescribed by law.

Petitioner also argues that the Division should be precluded from submitting any document other than the petition, amended answer and the stipulation of facts submitted and agreed upon by the parties. In particular, petitioner objects to the submission of the affidavit of Stanley K. Devoe discussed above.

CONCLUSIONS OF LAW

A. Before reaching the issue of the timeliness of the assessment, it must be resolved whether the submission of the affidavit of Stanley K. Devoe by the Division of Taxation was proper. Petitioner's position is that the stipulation signed by the parties precluded the submission of any other documentary evidence by the Division with regard to the relevant and material facts of this case.

However, the Tribunal's regulation with regard to submission of cases without hearing found at 20 NYCRR 3000.8 provides as follows:

"(b) Procedure. Within 30 days after the consent is executed, the law bureau shall submit to the administrative law judge or presiding officer assigned to the case all documentary evidence relevant to the issues, including any stipulation entered into by the parties, and shall provide a list enumerating all such documents to the petitioner or the petitioner's representative. Within 30 days after the law bureau provides such list, the petitioner may submit additional documents in support of the petition, and the parties may submit briefs within a reasonable period of time as agreed upon by them, subject to the power of the administrative law judge or presiding officer to fix the time as provided in paragraph (3) of subdivision (c) of section 3000.10. The parties may also submit proposed findings of fact and conclusions of law."

Given the provisions of the regulation, and the list of documents sent to petitioner's representative on April 23, 1991, which included the affidavit of Stanley K. Devoe, the Division's actions were consistent with the provisions of the regulation and therefore proper.

Although, as petitioner observes, the affidavit was not subject to cross-examination, it nonetheless was subject to petitioner's scrutiny and criticism. Furthermore, petitioner had ample opportunity to counter the affidavit with any documentary evidence he may have wished to submit in an effort to convince this forum to accord less weight to the affidavit.

B. Tax Law § 681(a) requires the Division to send notice by certified or registered mail when it determines that there is a deficiency in income tax. The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (see, Matter of Kenning v. State Tax Commission, 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384; Matter of Winifredo and Carol Malpica, Tax Appeals Tribunal, July 19, 1990). Further, pursuant to the provisions of Tax Law § 683(a), income tax must be assessed within three years after the return was filed. If a return is filed before the last day prescribed by law, for purposes of Tax Law § 683, it is deemed filed on such last day (Tax Law § 683[b]).

The issue in this case is not whether the Notice of Deficiency was sent to the taxpayer by certified mail at his last known address, for those facts were stipulated to by the parties, but rather the issue is whether the Notice of Deficiency was in fact mailed on or before the expiration of three years from the last day prescribed by law for the filing of the return.

The last day for the filing of the return in issue, for the tax year 1983, was April 16, 1984. As noted in the facts, April 15, 1984 fell on a Sunday and, therefore, pursuant to Tax Law § 691(c) and the regulation at 20 NYCRR former 146.4, when the time for filing a return falls on a Saturday, Sunday or legal holiday, the filing of the return will be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday or legal holiday. Therefore, the Division's time for assessing tax for the year 1983 would not expire until April 16, 1987, or three years following the last day prescribed by law for the filing of the return for 1983.

C. This case would have been resolved easily had it not been for the fact that the

Division failed to obtain a United States Postal Service postmark on the mailing log or other concrete evidence of mailing said Notice of Deficiency.

Adding to the problem is the fact that the Division used a meter stamp to affix postage to the envelope which, as it turned out, was the only "postmark" affixed to the envelope which carried the Notice of Deficiency to the taxpayer. That "postmark" bore the date of April 14, 1987 and the city of origin of Albany, New York.

Although the statute and regulations provide for the mailing of documents, including petitions and returns, by taxpayers to the Division, there are no such provisions with regard to the mailing of notices of deficiency to taxpayers (see Tax Law § 691[a]; 20 NYCRR former 146.4). It is noteworthy that the latter regulation does provide for postmarks not made by the United States Postal Service. The general rule is that timely mailing is treated as timely filing. The regulation requires that where the postmark is other than one made by the United States Postal Service, the postmark must bear a date which falls within the prescribed period or on or before the prescribed date for filing a document, and that the document must be received no later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (20 NYCRR former 146.4 [b][1]).

The Tax Appeals Tribunal has elaborated in this area in the Matter of Harron's Electric Service, Inc. (Tax Appeals Tribunal, February 19, 1988) where, citing a similar sales tax regulation providing for postmarks other than those made by the United States Postal Service, the Tribunal allowed an additional five days for the receipt of the petition by the former Tax Appeals Bureau saying that "five days is, in our opinion, not later than the date a document would ordinarily be received when mailed through the United States Postal Service." It would seem that, in the instant matter, the same reasoning could be extended to cover the situation where the Division of Taxation utilizes a metered postmark.

The Division has been held to a somewhat higher standard of proof with regard to the

mailing of notices of deficiency pursuant to Tax Law § 681(a). In Matter of MacLean v. Procaccino (53 AD2d 965, 386 NYS2d 111), the Division was unable to produce evidence of the mailing of the Notice of Deficiency to petitioner, other than a copy of a mailing log. There were no affidavits or testimony as to the accuracy or authenticity of the mailing log and no signature or initials appeared on said log. Further, the court in MacLean cited the Division's failure to produce affidavits or other evidence as to the course of business or office practices which would tend to prove that the mailing was in fact effected and, therefore, the weight ascribed to the mailing log was minimal. In light of these factors, the court in MacLean found that the Division was not in compliance with the notice requirements of Tax Law § 681(a).

The affidavit of Stanley K. Devoe, principal clerk with the Manual Assessment Unit, adds little to the Division's case herein. Although Mr. Devoe was able to testify as to office practices, he was not able to state from personal knowledge that the envelope containing the Notice of Deficiency in this case was delivered to the Post Office on April 14, 1987. In fact, it appears that his only recollection of the mailing process in this case comes from the mailing log which does not have a United States Postal Service postmark upon it, bears conflicting, unexplained dates, and was generally unintelligible.

D. Since the New York statutes, regulations and case law lack further elaboration on this issue, it would be helpful to look to the Federal statutes and regulations for guidance. When analyzing State statutes which are modeled after Federal statutes, Federal cases may be used for guidance (Matter of Levin v. Gallman, 42 NY2d 32, 396 NYS2d 623). The New York income tax provision for the Notice of Deficiency in Tax Law § 681 is similar to the provision of Internal Revenue Code § 6212, and Tax Law § 683 contains limitations on assessment and collection similar to those specified in Internal Revenue Code § 6501(a). Further, the Tax Appeals Tribunal has relied upon Federal cases for guidance in past decisions (see, e.g., Matter of Ilter Sener d/b/a Jimmy's Gas Station, Tax Appeals Tribunal, May 5, 1988).

Clearly, the date appearing on the deficiency notice alone is not proof of the date of its mailing (Southern California Loan Association v. Commr., 4 BTA 223, 226 [1926]). The

critical date is the date the deficiency notice was "mailed", and that date must be established by the Division (Magazine v. Commissioner, 89 TC 321). A Notice of Deficiency is "mailed" when it is delivered to the custody of the Postal Service for mailing (August v. Commissioner, 54 TC 1535, 1538).

Although it has been held that the Division may prove the act of mailing by establishing its customary procedure for the mailing of such notices and by the introduction of evidence that such procedure was followed (see, Cataldo v. Commissioner, 60 TC 522, 524, affd 499 F2d 550), that evidence is not conclusive in this case.

What is clear from the stipulated facts in this matter are the following facts:

(a) that the Division did enclose the Notice of Deficiency in an envelope which bore a machine-metered postmark dated April 14, 1987 (within the statutory time for assessment pursuant to Tax Law § 683[a]);

(b) that the United States Postal Service attempted to deliver this envelope containing the deficiency to petitioner on April 16, 1987 at his last known address at 83-24 258th Street, Floral Park, New York;

(c) that the envelope was sent via certified mail; and

(d) that the envelope was ultimately delivered to petitioner on April 17, 1987.

The clear inference from the stipulated facts is that the envelope containing the Notice of Deficiency was "mailed" or delivered into the custody of the United States Postal Service for mailing (see, August v. Commissioner, supra) on or before April 16, 1987, the first day on which the United States Postal Service attempted to deliver the envelope to petitioner.

In a similar factual situation, the Tax Court reasoned that:

"an article mailed from Dallas, Texas to Houston, Texas could not have been received in Houston, Texas on June 9, 1982, if it had not been mailed at least by June 8, 1982. On the basis of the evidence introduced in this case, we conclude that the Notice of Deficiency mailed to petitioner at his last known address in Houston, Texas was mailed to him from Dallas, Texas by certified mail on June 7, 1982, which is within the statutory period of limitations for the mailing of a Notice of Deficiency" (Masat v. Commissioner, 56 TCM 718, affd 886 F2d 1312).

The Tax Court in Masat concluded that the Service timely mailed a Notice of Deficiency to

petitioner even though it lacked any other evidence with regard to the mailing of said deficiency.

In Shuford v. Commissioner (60 TCM 452, affd 937 F2d 609 [6th Cir 1991]), the petitioner filed her return on or before the return's due date and never received a Notice of Deficiency. The Commissioner contended that he mailed the deficiency to the petitioner in a timely manner, but failed to acquire a properly stamped mailing log. The Tax Court, citing Magazine v. Commissioner (supra), noted that the absence of a postmarked Form 3877 (mail log) is not fatal to the validity of a deficiency notice when the respondent (Service) submits other documentary evidence or testimony to prove that the deficiency notice was timely mailed. Besides the certified mailing application, which was dated contemporaneously with the Notice of Deficiency in the Shuford case, the Service was able to show that the Notice of Deficiency arrived at its destination in Battle Creek, Michigan shortly after it was mailed from Cincinnati, Ohio. The Tax Court accorded substantial weight to the fact that the first delivery notice was two days after the date on the deficiency, further supporting the claim that the deficiency notice was mailed two days earlier from Cincinnati, Ohio. Ultimately, the Tax Court made a finding that the Service had in fact mailed the Notice of Deficiency by certified mail to the petitioner's last known address on that date, two days earlier than the first attempted delivery based upon that evidence.

Therefore, it is held herein that the attempted delivery of the Notice of Deficiency to petitioner, Arnold Siegelaub, on April 16, 1987, establishes that the metered postmark of April 14, 1987 and the date of the deficiency, April 14, 1987, accurately reflect when the deficiency was delivered into the custody of the United States Postal Service for mailing, and it is concluded that the Division was in full compliance with Tax Law §§ 681(a) and 683.

E. The petition of Arnold Siegelaub is denied and the Notice of Deficiency dated April 14, 1987 is sustained, together with such additional interest as may be lawfully owing.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE